UNITED STATE OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SBM MANAGEMENT SERVICES, Respondent, v. INTERNATIONAL CHEMICAL WORKERS UNION COUNSEL, UFCW, Charging Party.	No. 05-CA-129128, 05-RC-126500

RESPONDENT'S REPLY BRIEF AND BRIEF IN OPPOSITION TO THE CHARGING PARTY'S EXCEPTIONS

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent SBM Management Services (SBM") submits the following Reply Brief and Brief in Opposition to the Exceptions filed by the Charging Party to the recommended Decision and Order of Administrative Law Judge Arthur J. Amchan.[1]

I. INTRODUCTION

As noted in its original Brief in Support of Its Exceptions, this case involves a lopsided 20-8 rejection of a union organizing campaign on May 22, 2014 at a company that continued its practice of providing "Great Job" bonuses from its facilities across the nation to a worksite where the company began providing services in October 2013. Shortly before an organizing election at a Merck facility that manufactured vaccines, SBM provided bonuses to a small number of employees who voluntarily performed above and beyond their normal job duties, some on multiple occasions. (JD 2:23; 3:4-7).

[1] Throughout this brief, citations to the record shall be as follows: the ALJ's decision shall be "JD [Page]:[Line]"; the hearing transcript from the portion of the hearing shall be "Tr. [Page]"; the General Counsel's exhibits shall be "GC Exh. [Number]"; Respondent's exhibits shall be "R. Exh. [Number]; the General Counsel's Answering Brief shall be "GC AB [Page]" and the Union's Answer Brief shall be "U AB [Page]".

Both the General Counsel and the Union argued that SBM failed to establish either a past practice or legitimate business reason for the bonus. Both also argued that by providing bonuses on May 16, 2014, SBM significantly departed from its past practice, yet at the same time, argued that no past practice existed. GC AB 5, U AB 10. Finally, the Union argued that the ALJ's order should have included a mailing requirement to former employees because, at some point during the pendency of this action, SBM could lose its contract or go out of business, and SBM should be required to read the notice aloud during a meeting to then-current employees. As described more fully below, each of those positions lack merit.

II. SBM Had A Legitimate Reason For Offering Bonuses

Both the General Counsel and the Union argue that the law only requires SBM to establish a legitimate business reason for granting a bonus, and then subsequently limit that legitimate business reason to establishing a past practice. GC AB 5-6; U AB 5-7. To support this argument, both the General Counsel and the Union cite essentially the same case law. Upon closer inspection, the case law cited by the parties highlights why the bonuses offered by SBM were permissible.

For example, the case law cited involves grants of benefits to ***all*** employees. *See, e.g.*, *NLRB v. Exchange Parts*, 375 U.S. 405, 407 (1964) (announcing additional benefits including birthday holidays, overtime and vacation benefits for ***all*** employees shortly before a representation election violated the NLRA); *Torbitt & Castleman, Inc.*, 320 NLRB 907, 907-08 (1996) (offering more convenient parking for ***all*** employees shortly before a representation election violated the NLRA); *B&D Plastics*, 302 NLRB 245, 245-46 (2001) (granting ***all*** unit employees a day off with pay violated the NLRA); *Kanawha Stone Co.*, 334 NLRB 235, 242 (2001) (granting across the board show-up pay for all employees violated the NLRA); *United*

Airlines Services, Corp., 290 NLRB 954 (1988) (changing paydays for employee convenience required an additional hearing to determine whether it violated the NLRA).

Each of the cases described above to grants of benefits to ***all*** employees shortly before a representation election. Here, however, SBM did not grant benefits to all employees and did not grant the benefits for no reason. Instead, SBM provided bonuses to only those who participated in extra work, including members of the Union's organizing committee. Specifically, SBM informed Merck that the late April triple clean would take four days, yet the employees finished in three. Tr. 152. SBM initially informed Merck that the May triple clean could be completed by the end of the next business day, but instead, the employees volunteered to work overnight, which allowed Merck to resume vaccine production the next morning without any manufacturing downtime. Tr. 151-52.

SBM had legitimate business reasons to provide these bonuses - namely, the decision to recognize performance that went above and beyond expectations of the client. Here, in late April 2014, Merck was faced with the prospect of almost a full week without manufacturing, yet SBM had the facility sterilized in three days. In mid-May 2014, Merck had anticipated losing a days' production and part of its vaccine inventory. Instead, SBM completed its tasks in the overnight hours and delivered a sterile facility to Merck without any production downtime. If these are not the instances for providing bonuses, then nothing is.

Notably, every witness -- including the General Counsel's witnesses -- testified regarding the reasons for the bonus. Charlotte Bywaters, Dakota Knight, and Melissa Bennett all testified that only individuals who participated in the triple clean projects received a bonus. Tr. 36, 62, 84. Each testified that Chaves's stated intent was to reward them for their hard work and performance beyond the scope of their normal duties. Tr. Tr. 27, 36, 51, 73. Each of the General

Counsel's own witnesses agreed that SBM's site manager Ruben Chaves informed employees that the bonus checks were granted for the great job performed during the Triple Clean Projects. Tr. 27, 36, 51, 73, 121. One General Counsel witness even testified that a senior company management informed all employees at the last meeting with employees, which occurred after SBM provided the bonuses, that approximately 50% of its employees were union-represented and that SBM did not care whether the employees voted to unionize. Tr. 39. It simply does not make sense that on one hand, SBM would try to interfere with an election while on the other hand tell employees to vote however they pleased. Because the bonus payments slightly less than a week before the election were not intended to and did not have an impact on the 20-8 rejection of the Union, SBM did not violate the Act by distributing those bonuses.

Additional benefits, in this case bonuses, were not provided to the entire team, which clearly would be indicative of improper intent. Indeed, the employees themselves ultimately determined who received a bonus, because SBM only gave bonuses to those who volunteered for the extra work, rather than to all team members.

III. SBM Provided Bonus on Three Occasions at the Elkton Facility Between October 2013 and May 2016.

Both the General Counsel and the Union recognize that SBM provided bonuses previously. GC AB 7, U AB 3-4. However, the General Counsel differentiated bonus checks versus Visa gift cards and mischaracterized a previous bonus as a holiday gift. GC AB 8. The purported "holiday gifts" were nothing of the sort. In December 2013, less than two months after beginning its services at the Elkton facility, Merck had approximately six scheduled triple cleans with SBM at the Elkton facility. Tr. 159. Merck requested three or four additional triple cleans, an atypically excessive amount of triple cleans for any month. Tr. 159-60. Based on the extra workload during December 2013 and Merck's positive response, SBM provided Visa gift

cards to employees who volunteered for additional work. Tr. 157-58. Indeed, SBM provided the December 2013 bonuses for the exact same reason as the May 2014 bonuses and not as "holiday gifts." JD 3:19-20; Tr. 157-58.

IV. SBM Should Not Be Ordered to Mail Notices to Former Employees, or Read Any Notice at an Employee Meeting

The Union filed cross-exceptions suggesting that Notice posting requirements at the facility in question are insufficient because (i) SBM may lose its contract at the site, (ii) SBM may go out of business or close the facility, (iii) any Notice should be read at an all employee meeting, and (iv) it is inconsistent with the language of the Order. U AB 4-8. The Union also excepts to the ALJ's admitting business records at the hearing. U AB 8. As described more fully below, the Union's exceptions lack merit and should be rejected

The Union's argument is nothing more than theatrical misdirection. Indeed, the Union bases its argument on its self-serving point of view that SBM offered bonuses in a "physically dramatic and visually electrifying" manner. If losing a contract was a legitimate basis to require notices to be mailed to all former employees, then mailing notices would be required for every alleged violation of the NLRA for every contractor. If going out of business was a legitimate concern to require notices to be mailed to all former employees, then such a resolution would be required in every case, as there is never any guarantee that any company will remain in existence. The Union's request that SBM walk the plank and read the notice before an employee meeting would also be required for every alleged violation. That is simply not the law as illustrated by the Union's failure to cite any case law requiring such "theatrical" remedies.

The Union's argument that the Order is inconsistent with the ALJ's Decision also lacks merit. The Notice as written prohibits SBM interfering, restraining or coercing employees in their exercise of rights under Section 7 of the NLRA. Such language is sufficient.

Finally, the Union argues that the ALJ erred in admitting Company Exhibits 4 and 5. At the hearing, ALJ Amchan admitted these exhibits as business records. Tr. 175-76. There was no error admitting these document at the hearing, as they were authenticated and described by SBM Director of Strategic Accounts Michael Peckally, who testified that these exhibits represented bonus payment to SBM employees at many locations around the country. Tr. 171-75. As such, these exhibits were properly admitted.

V. CONCLUSION

This election here was not close. There is no evidence of anti-union bias as union organizing committee members also received the small work bonus. The employer, just like it had in the past, rewarded employees for doing a good job - that is something that should be encouraged - not punished. Indeed, if they did not give the small bonus in light of what they had done in the practice, that would have likely prompted a charge. The employer did the right thing here.

SBM did not grant bonuses to coerce its employees to vote against unionization. Instead, SBM granted bonuses to reward extra work completed outside the normal scope of the employees' duties and in continuance of its long standing practice. The employees' extra effort allowed SBM's client to resume vaccination production earlier than expected on two occasions. At bottom, SBM granted bonuses in good faith, and without intent to coerce its employees. For the reasons stated above, SBM respectfully requests that the Board grant its exceptions to the ALJ's Decisions and dismiss the Complaint.

DATED: February 17, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that he caused the foregoing Post Hearing Brief to be filed electronically through the NLRB's electronic filing system this 17th day of February, 2015. A copy was sent by email and first class U.S. mail to the following persons on this 17th day of February, 2015:

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